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No. 04-589

IN THE

Supreme Court of the United States

THE BRINK'S COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONERS

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I. COAL ACT PREMIUMS ARE TAXES.

Both the United States and the UMWA Combined Fund go to great extremes to avoid calling Coal Act premiums "taxes." Both briefs in opposition are peppered with circumlocutions—efforts to avoid the direct holding of every court of appeals which has addressed the issue. Thus, the briefs characterize Coal Act obligations as

> "mandatory statutory fees," U.S. Brief at 12 n.4;
>
> "funds owed to [the Combined Fund] pursuant to statute," *id.* at 12;
>
> "statutory payment obligations," *id.*;
>
> "payments to which [the Combined Fund] is entitled by statute," *id.* at 13;
>
> "statutory premiums," Combined Fund Brief at 13;

"monies owed to [the Combined Fund], not the federal government," *id.* at 15;

"statutorily-imposed obligations that are payable to an ERISA plan," *id.* at 17; and

"dollars that are owed to [a private party]—not the government," *id.* at 18.

Despite consistent rulings that Coal Act premiums are taxes (see Pet. at 12), both the United States and the UMWA Combined Fund, it seems, wish to remain free—when the case is briefed and argued on the merits—to argue that Coal Act premiums are *not* "taxes." (See, e.g., UMWA Combined Fund Brief at 16-17 n.8 where the respondent "assume[s], for purposes of opposing this petition only, that Coal Act premiums are subject to refund under 26 U.S.C. § 7422.")

Why do the parties opposing certiorari in this case go through such linguistic contortions? If Coal Act premiums are indeed taxes—and what else would you call mandatory assessments under a statute codified as part of the Internal Revenue Code—then the UMWA Combined Fund is collecting, administering, and disbursing those taxes. In so doing, the Fund, although a private body, is exercising an unmistakable government function. Indeed, the Fund is exercising not just any government function, but a core government function, one which lies at the heart of defining government's power under the Constitution. It is no accident of history that so many of the great contests over limits on arbitrary government power have been over taxation—from the English Bill of Rights, to the Declaration of Independence, to the Constitution itself. "No taxation without representation" is not some historical curiosity; it is a reminder that, throughout our constitutional history, the power to enforce and manage taxes is the last power of government that our jurisprudence would allow to slip into private hands.

II. RESPONDENTS MAKE NO ATTEMPT TO SUPPORT THE NONDELEGATION STANDARD ADOPTED BY THE COURT OF APPEALS.

The court of appeals recognized that delegations to private parties cannot be judged by the "intelligible principle" standard applicable to delegations to public agencies. Pet. App. at 14a. The court therefore held that "Congress may employ private entities for *ministerial* or *advisory* roles, but it may not give these entities governmental power over others." *Id.* at 15a (emphasis by the court). Concluding that the UMWA Combined Fund exercises only "ministerial and advisory tasks," the court denied petitioners' nondelegation claim.

Nowhere in their 49 pages of briefs do respondents attempt to support or apply the nondelegation test adopted by the court of appeals. While they argue that the UMWA Combined Fund does not exercise legislative or executive power, respondents do not contend that the authority of the UMWA Combined Fund is "ministerial" or "advisory," because most certainly it is not.

The UMWA Combined Fund has essentially all the powers of a government agency. The Combined Fund applies a federal statute. It writes regulations (the trust document and plan). It employs a staff (using tax dollars). It decides which individuals and classes of individuals meet the eligibility criteria in the statute. It dispenses a federal entitlement (medical benefits through a managed plan). And it enforces the statute against taxpayers and related parties subject to the law. The only difference is that this agency is privately controlled and managed, just like the other UMWA funds. The Court should decide whether the administration of a federal entitlement and the enforcement of a federal tax can be privatized in this manner.

III. PETITIONERS HAVE BEEN INJURED.

In a new argument not made to the court of appeals, the United States (but not the UMWA Combined Fund) contends that petitioners have sustained "no cognizable injury" by the delegation of authority to this private entity. U.S. Brief at 14. The Government cites no authority in support of this curious contention, so one is left to wonder what "harm" is required beyond having to pay unconstitutional taxes in an amount that now exceeds $100 million. Perhaps the Government's point is that the Coal Act could be written differently, with a government agency charged with managing the entitlement and enforcing the law, and petitioners would be out the same money. But the fact that Congress can delegate government power to the President and his officers does not mean that it can delegate the same power to itself or to the courts or to a private entity, particularly a private entity subject to influence from elements of the industry it is supposed to be regulating. Pet. App. at 153a-156a, 168a-179a. And it does not mean that those subjected to such an unconstitutional delegation are powerless to complain about it.

IV. LIABILITY UNDER THE COAL ACT CANNOT BE EXTENDED BY THE COURTS.

Since the filing of the petition for a writ of certiorari in this case, the Court handed down its decision in *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005). The UMWA Combined Fund argues that *Booker* supports severability for the Coal Act. UMWA Combined Fund Brief at 27 n.17. According to the Fund, where a statute is invalid in some applications, a court can "extend" the statute to other applications so the statute will continue to function. *Id.* The Fund is mistaken. Nothing in *Booker* or in existing severability law allows a court to revise a statute in this fashion.

Where a statute creates a "constitutionally underinclusive scheme," a court can either declare the entire scheme a nullity,

or it can "'extend the coverage of the statute to those who are aggrieved by the exclusion.'" *Heckler v. Mathews*, 465 U.S. 728, 738 (1984) (quoting *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)); *see Booker*, 125 S. Ct. at 757-58. In the present case, however, the Coal Act was not "underinclusive;" it was overinclusive. Congress imposed liabilities on more operators than the Constitution would allow. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 538 (1998). As a result, the statute must be narrowed or it must be nullified. The statute can be narrowed only if it can continue to function as a law. *Booker*, 125 S. Ct. at 746 (Breyer, J.); *id.* at 776 (Stevens, J. dissenting). If the statute is no longer fully operative as a law, it is not severable. *Id.*

There is no authority—in severability doctrine or elsewhere—for a court to expand the burdens of a statute in order to maintain its benefits. Yet, that is precisely what happened in this case. In the name of severability, remaining operators like petitioners have been made to pay more because companies like Eastern are no longer paying anything. Perhaps the statute can be rewritten to accomplish this result, but that is not the function of courts. *See, e.g., United States v. Reese*, 92 U.S. 214, 221 (1876) (rewriting a statute "is no part of our duty").

Even more remarkably, this "extension" of the Coal Act has occurred in the face of a severability clause that specifically prohibits a change in the application of the law to petitioners. 26 U.S.C. § 7852(a) ("If . . . the application [of a provision] to any person or circumstances . . . is held invalid, . . . the application of the provision to other persons or circumstances . . . shall not be affected thereby.") In an effort to keep the Coal Act functioning, the court of appeals dramatically increased the liabilities of remaining operators and, in the process, rewrote the statute and remade severability law.

In *Eastern Enterprises*, the Court declined to address the severability of the Coal Act because Eastern was relieved of any further liability under the statute, and there was no plaintiff before the Court that remained subject to the law. 524 U.S at 538 (citing *Printz v. United States*, 521 U.S. 898, 934-35 (1997)). It has taken seven years,[1] but the proper plaintiffs are now before the Court, and the severability issue left open by *Eastern* should be decided.

V. EASTERN ENTERPRISES AND COMPANIES LIKE IT REMAIN IN BUSINESS.

On the issue of whether beneficiaries formerly assigned to Eastern Enterprises and companies like it can be reassigned to other operators, the United States proposes a new solution. The United States contends that Eastern Enterprises and companies like it can be treated as if they are no longer in business, thereby allowing the Commissioner to disregard them in assigning beneficiaries under 26 U.S.C. § 9706. U.S. Brief at 19. The Coal Act has its own definition of "business," however, and under that definition "a person shall be considered to be in business if such person conducts or derives revenue from any business activity, whether or not in the coal industry." 26 U.S.C. § 9701(c)(7). That definition would have to be rewritten to make it applicable to Eastern Enterprises and similarly situated companies. Those companies remain in business, and they (not petitioners) are the operators which employed the retirees "for a longer period of time than any other operator . . . ." *Id.* § 9706(a)(3); *see Eastern*, 524 U.S. at 516 (noting that Eastern Enterprises remains "in business" under the Coal Act).

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1. The United States refers to petitioners' effort "at this late date" to invalidate the Coal Act. U.S. Brief at 9. Petitioners filed this case in 1997, and they have been diligently prosecuting it ever since. The case went to the court of appeals twice before reaching this Court. Pet. App. at 11a-12a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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